



Legal Update

April 2020

The SJC holds that police properly seized a cell phone incident to arresting the defendant, but improperly exceeded the scope of an inventory search by asking investigatory questions about the phone.

Commonwealth v. Tomas Barillas, 484 Mass. 250 (2020): On March 24, 2017, State Police Trooper Matthew Wilson was involved in investigating a fatal stabbing in Lynn. During the course of the investigation, Trooper Wilson and Lynn police learned that the defendant, Tomas Barillas, had outstanding warrants for larceny and drug offenses. Police located the defendant at his mother's multifamily dwelling. Trooper Wilson arrested the defendant and conducted a patfrisk. He seized a cell phone from the defendant's pocket, and transferred it to his own pocket. At the house, the defendant's father and his brother James agreed to speak with police at the Lynn police station. At the station, Trooper Wilson did not give the cell phone to the booking officer, nor did he fill out a State police custodial property inventory form.

During an interview with James and the defendant's father, Trooper Wilson asked James whether he had a cell phone. James identified the cell phone in Trooper Wilson's possession as his phone. To test the veracity of this claim, Trooper Wilson asked James for the code to access the cell phone. The code James supplied unlocked the device. Trooper Wilson continued to question James about the phone. Ultimately, James informed the police that his mother paid the bills and that the defendant used the cell phone "very often," but claimed it was his phone. Trooper Wilson obtained a consent form from James to search the cell phone. A "hand search" of the device revealed a video recording of the

defendant talking about the crime. A later forensic search revealed evidence of calls and text messages between the victim and the defendant on the night of the stabbing. The police returned the device two days later to James's mother.

The defendant filed a motion to suppress arguing that the police lacked probable cause to search the cell phone and that there was no valid exception to the warrant requirement. James's consent authorizing police to search the cell phone was also questioned. The defendant filed an amended motion which deemed the seizure and search of the cell phone as unlawful. The Superior Court allowed the motion because the police handled the cell phone not in accordance with a written inventory policy. Additionally, Trooper Wilson made investigative use of the cell phone before obtaining consent to search it. The Commonwealth appealed on the grounds that the phone was properly seized during a search incident to arrest or pursuant to a valid inventory policy. The Commonwealth argued that James's assertion that the cell phone belonged to him independently justified the officer's subsequent actions, including verifying his ownership of the cell phone and subsequent consent.

Conclusion: The SJC held that the seizure of the cell phone was proper as a potential weapon under the search incident to arrest doctrine. However, the police made impermissible investigative use of the cell phone and, as a result, any evidence obtained from the consensual search must be suppressed.

1st Issue: Was the cell phone lawfully seized as a search incident to arrest?

The SJC held that the seizure of the cell phone was proper, but the search was not. Pursuant to G. L. c. 276, § 1, "a search incident to a custodial arrest is well established as an exception to the warrant requirement under both the Fourth Amendment and art. 14." *Commonwealth v. Mauricio*, 477 Mass. 588, 592 (2017). "Under both Fourth Amendment and art. 14 jurisprudence, the purpose of the search incident to arrest exception is twofold:

- (1) to prevent the destruction or concealing of evidence of the crime for which the police have probable cause to arrest; and**
- (2) to strip the arrestee of weapons that could be used to resist arrest or facilitate escape." *Id.***

With respect to the first exception under the search incident to arrest doctrine, if a police officer believes that a cell phone found on an arrestee might contain evidence of the crime of arrest, the officer may seize that cell phone and secure it. However, the officer must obtain a search warrant before searching the cell phone. See *Riley v. California*, 573 U.S.

373, 403 (2014). In the present case, the police were arresting the defendant on outstanding warrants for larceny and drug offenses. At the time, there was no evidence that police had reason to believe that the cell phone had evidence linked to the offenses in the outstanding warrants.

The SJC held that the seizure of the cell phone satisfied the second exception under the search incident to arrest doctrine. Arguably, any hard object left in the possession of a suspect who is being arrested and transported may be used as a weapon, and it is not unreasonable to remove the item from the person. In *Riley*, 573 U.S. at 385, the Supreme Court recognized that "unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest." *Id.* at 387. For example, an officer may examine whether there is a razor blade hidden between the phone and its case. However, "once an officer has secured a phone and eliminated any potential physical threats, data on the phone can endanger no one," *id.*, and therefore the search of a cell phone as a weapon is limited only to the physical aspects of the phone. Here, it was permissible for police to seize the cell phone as part of a search incident to custodial arrest. The search of the content of the cell phone could not be justified pursuant to the search incident to arrest doctrine.

2nd Issue: Which inventory police should have applied in this case?

The Commonwealth argued that Trooper Wilson's seizure of the cell phone was warranted under the State police inventory policy. The defendant argued that the State police inventory policy cannot govern the inventory search of an arrestee in the custody of the Lynn police. The dispute over which policy governs was significant because the State police inventory policy authorized the search and removal of any property from the clothing or person of one who comes into the custody of the State police without specifying the appropriate time of seizure. Conversely, the Lynn police inventory policy provided more definitive guidance regarding timing (e.g., "as soon as is reasonably possible after arriving at the station").

The Lynn police inventory policy applied because the defendant was arrested by at least one Lynn police officer, taken to the Lynn police station, and booked by the Lynn police. Trooper Wilson testified that the defendant was in Lynn police custody. There was no dispute that "before a person is placed in a cell, the police, without a warrant, but pursuant to standard written procedures, may inventory and retain in custody all items on the person." *Commonwealth v. Vuthy Seng*, 436 Mass. 537, 550 (2002). Inventory searches are intended to be non-investigatory and are for the purpose of safeguarding the defendant's property, protecting the police against later claims of theft or lost property, and keeping weapons and contraband from the prison population. See *id.* at 550-551. "This inquiry is

fact driven, with the overriding concern being the guiding touchstone of reasonableness" *Commonwealth v. Abdallah*, 475 Mass. 47, 52 (2016). An inventory policy "must be written" and "explicit enough to guard against the possibility that police officers would exercise discretion." *Commonwealth v. Rostad*, 410 Mass. 618, 622 (1991).

This court repeatedly has upheld the suppression of evidence where investigatory use is made of items seized for a purported inventory purpose. See, e.g., *Mauricio*, 477 Mass. at 596 (search of digital camera exceeded bounds of inventory search exception because it was investigatory in nature); *Commonwealth v. White*, 469 Mass. 96, 101-102 (2014) (while lawfully seized container could be opened in accordance with inventory policy, search warrant was required to examine pills for investigative purposes); *Vuthy Seng*, 436 Mass. at 553-554 (viewing information on front of bank card was permissible because it "declare[d] its nature to anyone at sight," but recording account numbers written on back of card made it impermissible investigative search).

If Trooper Wilson had seized the cell phone in accordance with Lynn police inventory policy, the phone should have been promptly provided to the booking officer and secured in a property envelope and stored in the appropriate property locker. However, Trooper Wilson did not give the phone to the booking officer and he also neglected to complete the appropriate inventory forms. The SJC also considered what happens if the discovered property actually belongs to a third person, or if a third person claims the property, the inventory policy should provide guidance for determining the ownership of the item and the handling the item. If the police want to search the inventoried property for evidence of a crime, they need to obtain consent from the appropriate person (as determined by the inventory policy) or a search warrant.

In the underlying case, Trooper Wilson learned that the phone belonged to the defendant's brother. Upon this discovery, Trooper Wilson continued to ask James direct question about the ownership and usage of the phone. The questions Wilson asked turned an inventory into an investigation which is "inconsistent with the purposes underlying the inventory search exception to the warrant requirement, and is thus at odds with our law." *Mauricio*, 477 Mass. at 596. For all of these reasons, the inventory of the phone was improper.